Office Supreme Court, U. S.
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DEC 7 1925
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Supreme Court of the United States,

OCTOBER TERM, 1925.

No. 471.

HELEN P. BARDWELL, HARRIOT P. AYER AND ALICE P. FORSMAN,

Appellants,

vs.

ARGENT LAND COMPANY, A CORPORATION; SAMUEL LORD, JAMES G. ARMSON AND ODIN HALDEN, CONSTITUTING THE MINNESOTA TAX COMMISSION; *et al.*,

Respondents.

SUPPLEMENT TO BRIEF FOR APPELLANTS.

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Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 471.

HELEN P. BARDWELL, HARRIOT P. AYER and ALICE P. FORSMAN, Appellants,

vs.

SARGENT LAND CO., a corporation; SAMUEL LORD, JAMES G. ARMSON and ODIN HALDEN, constituting the Minnesota Tax Commission; *et al.*, Respondents.

SUPPLEMENT TO BRIEF FOR APPELLANTS.

I.

Chapter 226 of the Minnesota Laws of 1923 imposing a tax upon royalties, taken in connection with the provisions of the General Statutes of Minnesota (1913) concerning the taxation of real and personal property, constitutes double taxation in the strict legal sense.

(1) The following are the pertinent statutory provisions (R., pp. 45-47):

General Statutes of Minnesota (1913) relating to taxation:

"Section 1972. Real Property Defined. Real property, for the purposes of taxation, shall be construed to

include the land itself, and all buildings, structures and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all mines, minerals, quarries, fossils and trees on or under the same."

"Section 1974. Personal Property Defined. Personal property for the purposes of taxation shall be construed to include:

(1) All goods, chattels, moneys and effects.

* * * * * *

(6) Credits of every kind over and above debts owed by the creditor."

Section 1988, amended by Ch. 140, Laws of 1923:

"Classification of Property. All real and personal property subject to a general property tax and not subject to any gross earnings or other lieu tax is hereby classified for purposes of taxation as follows:

Class 1. Iron ore whether mined or unmined shall constitute Class 1 and shall be valued and assessed at 50% of its true and lawful value. If unmined it shall be assessed with and as a part of the real estate in which it is located, but at the rate aforesaid. The real estate in which iron ore is located other than the ore shall be classified and assessed in accordance with the provisions of Class 3 and Class 4 as the case may be. In assessing any tract or lot of real estate in which iron ore is known to exist the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot. * * *".

Section 2316, as amended by Ch. 102, Laws of 1923:

"Moneys and Credits. As used in this section the word 'money' means gold and silver coin, treasury notes, bank notes, and other forms of currency in common use; and the word 'credits' means and includes every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage due or to become

due, and all shares of stock in corporations the property of which is not assessed or taxed in this State.

"As hereinbefore defined, money and credits are hereby exempt from taxation other than that imposed by this Act and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof."

Chapter 226 of the Laws of 1923 (R., pp. 42-45):

"Section 1. There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter for permission to explore, mine, take out and remove ore from land in this State a tax of 6%.

"Section 2. For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this State for permission to explore, mine, take out or remove ore therefrom; and the word 'person' shall be construed to include individuals, copartnerships, associations, companies and corporations."

Sections 4, 5 and 6 provide for an annual report of the royalties paid and received and the assessment of the tax by the Minnesota Tax Commission.

"Section 7. Such tax shall be due and payable on the 1st day of June, 1924, and annually thereafter on the 1st day of June, and if not paid on or before that date a penalty of 10% shall immediately accrue thereon.

"Section 8. The situs of royalty for all purposes of this Act shall be in this State; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable in and to the lands for permission to explore, mine, take out and remove ore on which the royalty is paid.

"Section 13. All taxes assessed, levied and collected under the provisions of this Act shall be paid into the State Treasury and credited to the general revenue fund."

(2) Double taxation in a strict legal sense does not exist "unless the double tax is levied upon the same property within the same jurisdiction" (*Ohio Tax Cases*, 232 U. S., 576, at pp. 593, 594). This definition is elaborated in the text of Section 223 of Cooley on Taxation, 4th ed., p. 475, as follows:

> "Direct duplicate taxation, and by this is meant 'double taxation' in the strict legal sense of the term, means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the tax is laid, without taxing all of it a second time; * * *".

We submit that double taxation in that sense is the result of the tax on royalties imposed by the above Act of 1923, Chapter 226.

(*a*) The statutory definition of real property for the purposes of taxation is both comprehensive and specific. (Section 1972, *supra.*) It not only covers the land and the buildings thereon, but "all rights and privileges thereto belonging or in any wise appertaining", and specifically "all mines, minerals * * * on or under the same". In the case of mineral lands it is in the main the ore underground and the rights and privileges appertaining thereto which constitute their value as the basis of taxation. In fact, the Act classifying iron ore property for taxation purposes directs that "the assessable value of the ore exclusive of the land in which it is located and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot" (R. p. 46). It is through the exercise of the rights and privileges appertaining to the ore underground that the value of the ore is realized. Property consists of those rights and privileges. In *Eaton* v. *B. C. & M. R. R.*, 51 N. H. 504 (at p. 511), it is said:

> "In a strict legal sense land is not 'property' but the subject of property. The term 'property' although in common parlance frequently applied to a tract of land

or a chattel, in its legal signification 'means only the rights of the owner in relation to it'. 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing'. Selden, *J.*, in *Wynehamer* v. *The People*, 13 N. Y., 378, p. 433; 1 Blackstone's Com., 138; 2 Austin on Jurisprudence, 3rd Ed., 817, 818."

Again, at page 512, it is said:

"If the land 'in its corporeal substance and entity' is 'property', still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incident to the ownership of it."

In *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, at page 294, it is said as to the tax involved in that case:

"The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower Court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.* consumption, sale or keeping for future consumption or sale. * * * The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property."

It was conceded in that case that the tax, if a property tax, was invalid. In a note to the case (p. 291) it is said:

"If the tax in question were a property tax there would be double taxation of this property and the uniformity clause would be violated because the whisky has never been put in a separate class; *and under another statute all whisky stored in bonded warehouses was required to be assessed by the State Tax Commission at its fair cash value; and taxes at the rate of 40 cents per $100. of value were payable thereon.*" (Italics ours.)

In *Thompson* v. *Kreutzer*, 112 Miss., 165, cited in the *Dawson* case, *supra*, there is this statement of the matter:

> "Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. * * * In a strictly legal sense 'property' * * * is synonymous with the 'right of ownership' and means one's exclusive right of possessing, enjoying and disposing of a thing. * * * A tax on a thing is a tax on all its essential attributes and a tax on an essential attribute is a tax on the thing itself."

A tax on the rents and profits of land is *in effect* a tax on the land itself (see cases cited in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, pp. 589-591).

The Massachusetts tax of 6 per cent. on interest from bonds, notes, money at interest, etc. (Genl. Laws, p. 62) has been held to be a property tax. (*In re Ponsi*, 6 Fed., 2nd series, p. 324.)

Hence the Minnesota real property ad valorem tax was a tax on the essential attributes constituting the value of mineral lands; in other words, a tax on the rights and privileges of ownership therein, including the right to lease the same for the realization of the value of the ore.

(*b*) With such a tax existing there is added the taxation of royalties under Chapter 226 of the Laws of 1923. Royalties, as defined for the purposes of the Act, consist of "the amount in money received for permission to mine, take out and remove ore" from any tract of land (Sec. 2). The tax imposed is an annual tax of six per cent. upon all royalty received during the year. The nature of royalties under the customary mining lease is well settled by the Minnesota cases. They are "the rents and profits of the land" (*State* v. *Evans*, 99 Minn. 220; *Boeing* v. *Owsley*, 122 Minn. 190). It is said in *State* v. *Royal Mineral Association*, 132 Minn. 232, that "they are" (quoting the language of Lord Denman in *Queen* v. *Westbrook*, 10 Q. B. 178, 205), "the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows". Hence

there is a tax on the value of the unmined ore which consists of the right of the owner himself, or of his lessee, to bring it to the surface for sale or other disposition, and another tax, in the case of a lease, on the compensation payable to the owner by the lessee for the right to mine the ore and bring it to the surface. The value of the ore having been already taxed, to tax the owner's right to compensation for the ore when its value is realized by the operations of the lessee in bringing it to the surface is to again tax its value (*Dawson* v. *Kentucky Distilleries Co.*, 255 U. S., p. 294). The royalty tax is levied by reason of the ownership of property, or the rights incidental to such ownership and "to levy a tax by reason of ownership of property is to tax the property" (*id.*). Thus, taking the real property ad valorem tax and the royalty tax together, we submit that there is a clear case of double taxation in the strict legal sense. *State* v. *Royal Mineral Association*, *supra*, is an authority on this point. It was held in that case that to tax unaccrued royalties under a mining lease as "credits" within the meaning of the provisions of the statute for the taxation of personal property, which covers sums of money payable periodically, due or to become due, would be double taxation because "*the land, including the rents and profits, which alone give it value, has already once been taxed*".

Support is given to this view of the matter by the fact that Section 5 of Chapter 223 of the Minnesota Laws of 1921, imposing an occupation tax on persons engaged in the business of mining ores, provides, as one of the deductions from the valuation of the ore in ascertaining the amount of tax to be paid, that there shall be deducted "a percentage of the ad valorem taxes levied for said year against the realty in which the ore is deposited equal to the percentage that the tons mined or produced during such year bears to the total tonnage in the mine". This is a clear recognition of the close relation between such a tax and the ad valorem property tax; and that being true with respect to an occupation tax it is still more pertinent with respect to a tax on royalties.

II.

A sub-classification of iron ore for the sole purpose of taxing royalties and thereby imposing double taxation in the strict legal sense is a violation of the equality clause of the 14th Amendment as arbitrary, unreasonable and oppressive.

Under Section 1988 of the General Statutes of Minnesota (1913), as amended by Chapter 140 of the Laws of 1923, there is a classification of real and personal property subject to a general property tax for the purposes of taxation (R., p. 46). Iron ore is placed in Class 1 and is subjected in its valuation to the highest percentage of full value. Accepting that classification as a valid one for the purposes of this argument, a tax on royalties in the case of mining leases would be clearly unwarranted as not within the scope and purposes of the classification. In other words, it is a classification covering all iron ore mined or unmined for the purposes of property taxation without any discrimination whatsoever.

The object of Chapter 126 of the Laws of 1923 was to impose a special property tax limited in its operation to a special class, viz., those in receipt of royalties under the customary mining lease. There is no classification to warrant this unless the Act of 1923 itself is a classification, which, in view of the existing general classification, would be the creation of a sub-class. The question then arises whether it is within the rules governing classification which have the approval of this Court to sanction the creation of a sub-class for no other purpose than to impose a tax which as a property tax is clearly double taxation in the strict legal sense as has been shown. We believe that there can only be

one answer to this question, in view of the general condemnation of such double taxation as obnoxious. (*Campbell* v. *Newport*, 174 Ky., 712; *Chicago* v. *Collins*, 175 Ill., 45; *State ex rel. Koeln* v. *Improvement Co.*, 278 Mo., 310; *Gulf & Ship Island R. R. Co.* v. *Adams*, 90 Miss., 559; *Central Graneries Co.* v. *Lancaster Co.*, 77 Neb., 311; *State* v. *Northern Pacific Ry. Co.*, 130 Minn, 377. Also Cooley on Taxation, 4th ed., Sec. 225).

In *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, at p. 417, it is said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification (*Gulf, Colorado & Santa Fe Ry.*, vs. *Ellis*, 165 U. S. 150, 155, 165; *Cotting* vs. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S., 540, 559.)"

It is not necessary to multiply cases on that subject. A classification adopted solely to support double taxation is not a classification "based upon some real and substantial distinction or bearing a reasonable and just relation to the things in respect to which such classification is imposed". This would seem to be fairly evident and not to require further elaboration. Whether a classification is valid or invalid with respect to the equality clause of the 14th Amendment is for this Court to determine, and it is not in this instance embarrassed by any ruling of the State Supreme Court sustaining such a classification. Even if there were such a ruling it would still be for this Court to determine whether the classification conforms to the requirements of the equality clause. (*Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, see p. 180.)

We purposely refrain from any discussion of the other grounds for the contention that the Act of 1923 is in violation of the equality clause of the 14th Amendment, for the reason that they are so fully covered by the other briefs before the Court in these various cases.

Respectfully submitted,

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